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CASE NOTES

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CASE LAW SUMMARIES: November, 2004

City of Bartow v. Aggirre, 29 FLW(D) 2412 (October 28, 2004).

The employer/carrier appealed an Order from Judge Hofstad which awarded temporary benefits. The claimant left work on the advice of her psychiatrist. The employer/carrier alleged that this was not competent substantial evidence to award temporary benefits. The 1st DCA agreed and found that there was not competent, substantial evidence from which one might reasonably conclude that a causal relationship existed between the claimant's compensable injury and her wage loss.

Adamides v. City of Maitland, 29 FLW(D) 2415 (October 28, 2004).

The claimant appealed an Order denying permanent total disability workers' compensation benefits. The date of accident was July 12, 1969. The claimant received a full fireman's disability retirement pension from the city. The 1st DCA held that the claimant was not entitled to receive permanent total disability benefits and disability retirement pension based on the authority of Section §440.09(4), Florida Statutes (1969).

Read v. CTL Distributors, 29 FLW (d) 2432 (October 29, 2004).

The claimant appealed the ruling of the JCC finding that the claimant was not permanently and totally disabled until November 20, 2002, because the claimant had not achieved overall maximum medical improvement until that date. The claimant also appealed the JCC's denial of impairment benefits. The 1st DCA affirmed the JCC's finding that the claimant was permanently and totally disabled as of November 20, 2002, because there was competent substantial evidence to support the JCC's finding that the claimant had reached overall maximum medical improvement from both his physical and psychiatric injuries on that date.

The 1st DCA reversed the JCC with regard to the impairment benefits. The 1st DCA remanded the case to the JCC to determine an appropriate award of impairment benefits for the period from April 1,

2001, the date TTD benefits were terminated by operation of statute. The 1st DCA also stated that because the employer/carrier paid TTD benefits for a period of time from the date of the accident, April 1, 1999, until January 14, 2002, it should be allowed a credit for TTD benefits paid subsequent to April 1, 2001 (when the 104 weeks expired).

Derogatis v. Fawcett Memorial Hospital, 29 FLW (D) 2439 (November 3, 2004).

This was an appeal before the 2nd District Court of Appeal. In the civil suit, Derogatis sued Fawcett Memorial Hospital and the hospital asserted workers' compensation immunity. Summary Judgement was granted in favor of the hospital.

Summary Judgement was granted in favor of the hospital on the grounds that Derogatis was in a special employment relationship with the hospital. It was undisputed that Derogatis was actually paid by American Endoscopy Services and was working as an onsite manager at the hospital. The 2nd DCA found that there was no evidence of a contract creating a special employment relationship between Derogatis and the hospital and, accordingly, the hospital could not assert workers' compensation immunity on the facts presented.

The 2nd DCA stated that there is a presumption that the employee is not a borrowed servant but continues to work for the actual employer. To overcome this presumption, three elements must be shown: there was a contract for hire, either expressed or implied, between the special employer (in this case the hospital) and the employee; the work being done at the time the employee was injured was essentially that of the special employer (the hospital); and the special employer had the power to control the details of the work being done at the time of the injury.

European Marble Company v. Robinson, 29 FLW(d) 2491 (November 5, 2004).

In this case the JCC found that the claimant sustained a compensable injury when he fell approximately 10 feet on to concrete and suffered a skull fracture. The employer/carrier denied the claim based upon the intoxication defense. The claimant was treated at the emergency room and the claimant's blood alcohol level was .053%. The employer/carrier presented evidence through the testimony of the registered pharmacist that the claimant's blood alcohol level exceeded .08% (the legal limit) at the time he was injured.

A medical technologist testified that the claimant's blood was drawn for medical (as opposed to legal) purposes and that the sample was not put in a sealed bag nor was a chain of custody maintained. The Court conceded that while a drug test performed for medical purposes may be admissible to support an intoxication defense under §440.09(3), the presumption set out in §440.09(7)(b) does not arise as the result of a positive confirmation drug test using a medically drawn sample unless the Florida Administrative Code Rules required by §440.09(7)(d) are followed.

AHCA has promulgated rules for the authorization and regulation of drug testing policies, procedures and methods. The 1st DCA concluded that these rules applied to blood alcohol as well as illegal

drugs. Because the testimony of the medical technologist demonstrated a lack of compliance with the AHCA Rules, the 1st DCA affirmed the JCC's ruling that the employer/carrier was not entitled to a presumption that the injury was occasioned primarily by the influence of a drug upon the claimant.

It should be noted that the relevant statute changed with the amendments effective October 1, 2003. The statute has changed to place a burden on the claimant to prove that the accident was not occasioned primarily by the intoxication of the employee. This case may have had a different outcome if the accident date were after October 1, 2003.

Cagnoli v. Tandem Staffing, 29 FLW (D) 2500 (November 5, 2004).

In this case, the JCC struck the claimant's Petition for Benefits for failing to include a Social Security number as required by §440.192, Florida Statutes. The claimant raised a number of arguments including whether the requirement violates the Federal Privacy Act. The 1st DCA held that the JCC erred in dismissing the Petition for Benefits and directed that the claim be reinstated. Accordingly, it may no longer be a requirement that the claimant put a Social Security number on a Petition for Benefits.

Miami-Dade County v. Aravena, 29 FLW (D) 2507 (November 10, 2004).

This was an appeal to the 3rd District Court of Appeal. Miami-Dade County asserted workers' compensation immunity at the trial level. The trial court applied the "unrelated works" exception to workers' compensation immunity and held Miami-Dade County liable. The 3rd DCA held that the unrelated works exception did not apply and that Miami-Dade County was immune from suit. The 3rd DCA cited numerous examples where various courts found no exception from co-worker immunity. The Court stated that The Supreme Court has concluded that the "unrelated works" exception to workers' compensation immunity was to be interpreted narrowly, applied only when it can clearly be demonstrated that a fellow employee whose actions caused the injury was engaged in works unrelated to the duties of the injured employee.

Miami-Dade County v. Fonken, 29 FLW (D) 2509, (November 10, 2004).

This is another case decided by the 3rd District Court of Appeal. Miami-Dade County appealed a Circuit Court Order granting a Rule Nisi. The Rule Nisi enforced an Order from a Judge of Compensation Claims approving a mediation agreement for an IME.

The 3rd DCA reversed the Order stating that an Order from a Judge of Compensation Claims granting an IME is not a Final Compensation Order that may be enforced by a Circuit Court. The Circuit Court has jurisdiction to enforce Final Compensation Orders of a Judge of Compensation Claims. Interlocutory Orders, such as the one granting or agreeing to an IME, are matters which belong before the Judge of Compensation Claims who has the power to enforce these Interlocutory Orders. Accordingly, the Order granting the Petition for Rule Nisi was reversed.

Powers v. E.R. Precision Optical Corporation, 29 FLW (D) 2512

(November 10, 2004).

The claimant was involved in an altercation with his co-worker on March 8, 2002. The claimant then sued the co-worker for battery in Circuit Court and also the employer on a theory of vicarious liability. The Circuit Court action went to a verdict finding the co-employee guilty of battery while in the course and scope of his employment and judgement was entered in favor of the claimant for $25,000.00.

After the conclusion in the civil suit, the claimant then filed Petitions for Benefits seeking the payment of workers' compensation disability benefits. The employer/carrier responded with a Motion for Summary Final Order which was granted by the Judge of Compensation Claims. The claimant then appealed to the 1st DCA.

The 1st DCA stated that the broad question is whether the injured employee is "judicially estopped due to an inconsistent position" and whether the claimant's "two positions are indeed incompatible." In the civil action, the claimant took the position that the co-worker was the alter ego of the employer. The 1st DCA reasoned that the civil suit against the co-employee must be deemed a suit against the employer itself. Because of this, the 1st DCA found that the claimant was judicially estopped to take an inconsistent position in his Petition for Benefits. An employer's intentional tort (even if committed by an alter ego) is not an "industrial accident."

Harper v. Sebring International Raceway, Inc., 29 FLW (d) 2514 (November 10, 2004).

The claimant in this case worked in the fire protection team at the Sebring International Raceway. On November 23, 2001, there was a severe accident at the raceway and the claimant was called upon to extricate the driver from the vehicle. There was evidence that this extrication took over 45 minutes and was the longest one that the co-worker had ever worked on. There was also testimony that such extrications take place only once or twice per year. The claimant suffered from pre-existing high blood pressure and diabetes. Five minutes after completion of the extrication, the claimant suffered a heart attack and had to undergo a quadruple bypass.

The 1st DCA pointed out that the general rule regarding the compensability of a heart attack occurring during the course of employment is that the heart attack must have been caused by the unusual strain or over exertion of a specifically identifiable effort not routine to the work the employee was accustomed to performing. The JCC found that because the claimant had performed extrications in the past that such an activity was routine to the work that the claimant was accustomed to performing and that the heart attack was not compensable.

The 1st DCA reversed stating that merely because a claimant may have previously performed the same or similar tasks as he or she performed prior to suffering a heart attack does not make the task routine to the claimant's job. There was testimony in this case that the majority of the claimant's time was spent "sitting around" waiting for an accident to happen. The 1st DCA stated that if the claimant had suffered a heart attack while sitting in his truck, that would be during his routine activity and would not be compensable. However, in the instant case, the claimant was involved in an activity that occurred only once or twice per year, thus making it not routine. The 1st DCA determinated that the accident was compensable and remanded the case for a determination of medical causation.

Croes v. University Community Hospital, 29 FLW (D) 2572 (November 15, 2004)

The claimant appealed an Order of the JCC dismissing pending Petitions for Benefits without prejudice. During the appeal, the claimant also re-filed the Petitions before the JCC. The parties did not agree that the re-filed Petition would not be barred by the statute of limitations, but it was a possibility raised in the appeal. The 1st DCA found that the Order was non-final and non-appealable because the JCC still has to make a determination on the re-filed Petitions as to whether they are barred by the statute of limitations. The claimant would have an adequate remedy on appeal if the subsequent claims were, in fact, barred by the statute of limitations.

Escutia v. Greenleaf Products, Inc., 29 FLW (D) 2577 (November 17, 2004).

The claimant suffered a compensable accident on December 8, 2000. The employer/carrier authorized treatment and the doctor was deposed on August 28, 2002. The claimant saw the doctor for one

follow-up visit and the claimant rescheduled the deposition of the treating doctor to take place on February 24, 2003.

The employer/carrier filed a Motion for Protective Order on the grounds that the doctor had already been deposed and that the employer/carrier should not have to incur defense costs for an additional deposition absent any change since the first deposition. The JCC entered an Order directing that the second deposition be only "an update deposition" to "cover subjects which occurred after August 28, 2002." The deposition was then taken and apparently exceeded the scope of this Order. Regardless, the JCC elected to admit the second deposition at the merits hearing on March 12, 2003. The JCC then ruled in favor of the employer/carrier and stated in the Order that she rejected any of the opinions of the doctor contained in the February 24, 2003, deposition transcript.

The 1st DCA ruled that is was improper for the Judge to admit the deposition into evidence and then reject all of the testimony contained in the deposition on the grounds that it was outside the scope of the Court's February 12, 2003, Order limiting the deposition to a "update deposition." Basically, the JCC said that she would let the deposition into evidence and give it whatever weight it deserves. The employer/carrier was then probably asked to draft the Order since the JCC ruled in favor of the employer/carrier. The employer/carrier should not have put in the Order that the JCC completely rejected the second deposition, but rather should have just stated that the JCC has weighed all of the testimony and finds in favor of the employer/carrier. As written, it appears as though the claimant was prejudiced by the Judge's initial ruling allowing the deposition into evidence only to have the actual Order reflect that the JCC completely rejected the testimony.

Stage v. Overnite Transportation, 29 FLW (D) 2583 (November 17, 2004).

The JCC awarded the employer/carrier a credit for an alleged overpayment of impairment benefits. The claimant appealed this finding on the grounds that it was not raised before the JCC. The 1st DCA found that the E/C failed to properly raise the issue of appellant's impairment rating or an award of credit prior to the hearing before the JCC. Because of this, the 1st DCA reversed the award of a credit regarding the temporary total disability.

If overpayments are due, then the employer/carrier should raise the overpayment in a DWC-4, in a response to a Petition for Benefits and/or through adjuster testimony.

Duran v. Hotelerama Associates, Ltd., 29 FLW (D) 2584 (November 17, 2004).

This case deals with workers' compensation immunity. The Circuit Court entered Final Summary Judgement in favor of the hotel on the basis that the injured employee was a subcontractor of the hotel for purposes of workers' compensation immunity.

The hotel leased space to Club Tropigala. The claimant was actually an employee of Club Tropigala. She left Club Tropigala to take a bathroom break in the hotel when she slipped and fell sustaining injuries.

The hotel moved for summary judgement on the grounds that no genuine issue of material fact existed as to its entitlement to workers' compensation immunity. They alleged that the claimant was a subcontractor of the hotel by virtue of the hotel's contractual relationship with Club Tropigala. The 3rd District Court of Appeal did not agree with the Circuit Court's determination and found that the claimant was not an employee of the hotel for purposes of workers' compensation immunity.